



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4100134/2024 Hearing Held at Edinburgh on 17, 18 and 19 June
2024**

Employment Judge: M A Macleod

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Mr R Muyanja

**Claimant
Represented by
Mr R Wachtel
Solicitor**

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Mitie Limited

**Respondent
Represented by
Mr T Merck
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The Judgment of the Employment Tribunal is that the claimant's claim of
unfair dismissal fails and is dismissed.**

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 9 January 2024 in which he complained that he had been unfairly dismissed by the respondent.
2. The respondent submitted an ET3 response form in which they admitted that the claimant was dismissed by them, but denied that the dismissal was unfair.

3. A Hearing was listed to take place on 17, 18 and 19 June 2024 at the Employment Tribunal in Edinburgh. The claimant appeared and was represented by his solicitor, Mr R Wachtel. Mr Merck, advocate, appeared for the respondent. While it was possible to conclude the evidence within
5 the scheduled diet, I directed that parties should present written submissions to the Tribunal, with which they agreed. Those submissions were provided to the Tribunal on 2 July 2024.
4. A Joint Bundle of Productions was presented to the Tribunal by the parties, and reference was made thereto by the parties and the Tribunal
10 throughout the Hearing.
5. The respondent called as witnesses William Harper, Security Operations Manager; Stephen Andrew Kerr, Operations Manager; Robert Cook, Senior Operations Manager; and Alexander Reid, Regional Manager.
6. The claimant gave evidence on his own account.
7. This is a case in which the claimant claims only unfair dismissal. At one
15 point it was thought that he may be relying upon a claim that he was automatically unfairly dismissed on the grounds of having made a protected disclosure, but on 15 May 2024, Mr Wachtel emailed the respondent to advise that the claimant did not wish to pursue such a
20 claim (80).
8. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 22 February 1980, commenced
25 employment with the respondent as a Security Guard on 19 March 2019.
10. The respondent is a company providing facilities management and professional services, employing approximately 17,000 people across the United Kingdom.

11. The claimant was employed at the Scottish Qualifications Authority (SQA) offices, Lowden, Edinburgh. He was offered employment by the respondent by letter dated 27 April 2019 (119). In the offer letter, he was advised that he would commence employment on 8 March 2019, and would be based at 240312 (the code for the SQA offices). The respondent provided him with a contract of employment (122ff), setting out his terms and conditions of employment. Essentially, the claimant's duties as a Security Officer were to protect the client's premises from fire, theft or vandalism, and to carry out other site-specific duties.
12. The claimant normally worked a night shift. He reported to William Harper, who would, approximately every 5 weeks, attend at the site in order to check on the claimant's performance and his health and safety. He was in regular telephone contact with the claimant.
13. At the SQA site, the claimant had access to 3 telephones: an office landline at the reception desk where he would be located; a work mobile phone kept at the premises and handed to his colleague who would work the day shift opposite him; and his personal mobile phone. If the claimant could not be reached on the landline, Mr Harper would attempt to call him on one or other, or both, of the mobile phones.
14. On an hourly basis, the claimant, in common with all the respondent's security officers, required to make a check call to the respondent's control room. As a lone worker, it was essential for the respondent to be assured that he was safe and required no assistance with his duties or for any other reason. If he did not call at the expected time, the control room would call him.
15. On 5 June 2023, Robert Cook, Operations Manager, invited the claimant to attend a disciplinary hearing on 9 June 2023 (266) to answer the allegation that he had breached the respondent's disciplinary policy by sleeping while on duty, on 3 April 2023.
16. Notes of the disciplinary review meeting were produced (270ff). In the course of that hearing, Mr Cook asked if it was correct that the claimant

had not answered his phone when control called, and as a result missed his check calls. The claimant replied that he had been hoovering, which was why he had not heard the phone ring. He described himself as tired and overworked.

5 17. Mr Cook then put to the claimant *“Due to you missing your check calls a Mitie response driver was dispatched and when he arrived on site he found you sleeping behind the desk.”* The claimant replied *“Yes, I dosed off for a couple of minutes.”*

10 18. He repeated that the reason he was sleeping was that he was *“knackered that night really tired.”*

15 19. Following the hearing, on 15 June 2023, Mr Cook wrote to the claimant (273) to confirm that he had taken into account the reason why he had fallen asleep, but that the seriousness of the misconduct, and having considered all the possible alternatives, felt that the correct decision had been made, namely to issue the claimant with a final written warning. He advised that the warning would remain on the claimant’s personal file for 12 months from the date of the letter.

20. He confirmed to the claimant that he had the right to appeal against the warning, but the claimant did not choose to do so.

20 21. The warning remained live in September 2023.

25 22. On 12 September 2023, Mr Harper received a report that the claimant had been arriving late for shift and had been missing check calls to the control room daily. As a result, he decided to visit the SQA building in order to discuss these matters with the claimant and to observe him at work.

23. He attended the SQA office at 11.30pm. Given the concerns he had when he arrived, he completed a form headed *“Investigation meeting Notes”* (138ff).

24. He noted:

5 *“WH: At 23:15 I attended the SQA site as I have been advised that officer Robert had been coming late to shift and that he had been missing check calls to the control room daily. On arrival I could see through the glass door and officer Robert was sitting in the chair at the seating area sleeping. He had his back to me and had his head tilted backwards. I watched Robert for a few moments before phoning the site phone which woke Robert up.*

10 *WH:I explained to Robert why I was onsite and asked him if he could explain why he was late, missing check calls and if he could explain why he was caught sleeping.*

RM: Robert tried to explain that he was only a couple minutes late for the shift tonight and a couple minutes late over the weekend. Robert was trying to explain that he goes on patrol around the times the control has tried to phone him.

15 *WH: I explained to Robert that the site phone is a mobile and he should take it with him when on patrol or conduct his check calls before going on patrol.*

RM: Robert said he forgot to take the phone with him.

20 *WH: I showed Robert the site mobile and checked the data for the last couple nights he was on and it had 17 voicemails and various missed calls from the control room. I explained to Robert that these were all on his shifts.*

RM: Robert could not answer.

WH: I asked Robert why he was sleeping onsite.

25 *RM: I was only nodding off.*

WH: I stood and watched you for a good couple minutes Robert and when I called the site phone you woke up and tried to answer your own phone. You were sleeping and you can't deny that as I have

caught you red handed. I asked Robert if he had anything to say but he just shook his head.”

25. The claimant was suspended from duty on full pay pending an investigation.

5 26. On 13 September, Simon Parsons, the Facilities Manager for SQA and thus the client of the respondent for these purposes, emailed Mr Harper (143/4):

10 *“Not sure if you had Abbas on the phone last night, but I am lead (sic) to believe there was an exchange of words as Robert was late in, obviously this taking place in our reception is not acceptable, perhaps you could let me know if you’ve heard anything.*

Also for noting that Robert was locked out of the building on Saturday morning until canteen staff came in, again not acceptable.”

15 27. Abbas was the claimant’s colleague, employed by the respondent as a security officer, who would carry out the day shift opposite him, and with whom he would regularly conduct a handover.

28. Mr Harper replied (143):

“Just a follow up to your email.

Robert has been suspended following investigation and disciplinary action.

20 *I was onsite last night to speak to him about various issued (sic) recently raised and I came across him sleeping.*

We will back fill him from Friday night with a trained officer from our supply partner until the issue has been resolved.

Apologies for this and will keep you updated on the outcome.”

25 29. Stephen Kerr conducted an investigation meeting with the claimant on 15 September 2023, and kept notes of that meeting (146ff).

30. It was recorded:

“SK: It is around what happened on the 12th September. I will read you the statement I’ve been sent from William. With that statement in mind why were you sleeping on site?”

5 *RM: Was more like dizziness, drowsiness, I took medication after coming to work.*

SK: What medication did you take?

RM: Peptic liquid.

SK: What’s that for?

10 *RM: Excess acid I taken it for the first time.*

SK: That’s what made you drowsy?

RM: I was feeling the drowsy and I sit there and watch the news, I couldn’t talk much but I had a lot to tell him I wasn’t feeling ok. When I went to the doctor I stopped it I took it 2 nights.

15 *SK: Is drowsiness a listed symptom or sidefect (sic) of the medication you took?*

RM: It’s a major side effect.

SK: Is this prescribed medication?

RM: Yes by a doctor.

20 *SK: Like Gaviscon for acid reflux?*

RM: Doctor prescribed me it on Tuesday and I got it from the farmacy (sic).

SK: In your opinion you were not sleeping but drowsy?

RM: I was watching the news and struggling.

SK: Did you make anyone aware of your condition on your check calls?

RM: No I didn't.

SK: When William was onsite did you make him aware you were drowsy and unwell?

5 RM: I didn't mention it, I'd taken it for the first time.

SK: Around your lateness I looked into the last 4 weeks, you have missed book on 12 times. Is there reason for this?

RM: The medication is evidence of the doctors.

10 SK: The question is why you've been late you say the medication but you took it on the night in question.

RM: It's ok.

SK: Why are you continually missing check calls?

RM: On lateness my bus comes at around 5 to and it takes me a few minutes late but there are some delays.

15 SK: If your bus is making you consistently late why aren't you getting an earlier bus?

RM: That's a good question on Tuesday Abbas came on site 27 minutes when he came he changed it he came to leave me from my site at 32 past he came at 33 minutes I never complained.

20 SK: We are talking about you not other officers.

RM: On that particular Tuesday when he arrived at 33 I left without any complaint, with that I thought they (sic) was no need to get a taxi usually it's the same time.

SK: Looking at your book on data I understand your book on pattern

25 RM: It's selfish of Abbas to expect what others give you.

SK: Around the check calls why are so many being missed?

RM: Maybe there is no particular reason.

5 *SK: So on your site your (sic) averaging 4 missed check calls per shift check calls take on the night shift and there over 130 missed check calls in the month august. Were you sleeping during these calls?*

RM: No they are missed most at 7 and 8 o'clock when colleagues are onsite, you are letting people in.

SK: Do you have the intouch app?

RM: No.

10 *SK: We can check the times of this missed calls you are saying they are from 7 to 8 o'clock?*

RM: Yes most of them for letting in the drivers.

SK: Ok Robert thank you for the time today would you like to add anything?

15 *RM: For the people in evidence I will contact my doctor I've stopped it, I could talk much as my mouth was so dry, it was the medication and I couldn't tell him this. the check calls from is very busy.*

SK: Are you busy at 4.23am?

RM: The business starts from 3am till finish time.

20 *SK: I have a screen shot of the books ons missed.*

RM: When I took that peptic I wasn't very stable. I couldn't talk properly.

SK: Would you say you fit for work?

RM: I stabilised later on I don't complain."

31. It was noted that the meeting began at 1222 and ended at 1248.

32. On 20 September 2023, Mr Kerr wrote to the claimant (150) to advise:

5 *“I am writing to confirm that with effect from 15th September 2023, you were suspended from your duties on full pay following sleeping in the workplace while on duty, being negligent of your duties, continued lateness and missing check calls.*

10 *I must state that this is a precautionary suspension pending a full investigation into this matter the outcome of any disciplinary proceedings which may ensue. Your suspension is not a disciplinary sanction and does not prejudice the outcome of the investigations. The decision has been made to suspend you to ensure that the integrity of the investigation is protected and to protect the business. If at any stage during or at the end of the investigation, or at any stage of the disciplinary procedure, it is considered that this suspension should be lifted, you will be informed immediately...”*

15 33. The letter purported to invite the claimant to an investigatory hearing, though the copy produced to the Tribunal did not identify a time and date of the hearing.

20 34. However, Robert Cook, Operations Manager, took over responsibility for this case shortly thereafter, and wrote to the claimant on 22 September 2023 to reiterate that he had been suspended from his duties, on full pay, following allegations of gross misconduct. He identified the allegations (that the claimant had breached the respondent’s Disciplinary Policy) as:

- *“Seriously breaching our health and safety procedure*

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- *Specifically, it is alleged that on 12th September 2023 you were sleeping whilst on duty, which is unacceptable in your role of a security officer as it leaves the site at risk.*

- *Persistent lateness*

- *Specifically it is alleged that within the last 4 weeks, you have missed book on 12 times.*

- *Gross negligence of duties*
 - *Specifically, it is alleged that you are missing on average 4 check calls per shift and in August 2023 there were over 130 missed check calls when you were on the nightshift.*

- 5 35. He invited the claimant to a disciplinary hearing, to take place on 25 September 2023 by Microsoft Teams, at 11.30am.
36. The disciplinary hearing took place as scheduled on 25 September 2023. Mr Cook chaired the hearing, and was accompanied by Alexander Clark, as note taker. The claimant attended and was not accompanied nor
- 10 represented. Notes were produced (154ff).
37. With regard to the incident on 12 September, Mr Cook referred to the fact that the operations manager had alleged that he had caught the claimant sleeping. The claimant replied: *“No I do not agree, when he called me, I was looking for the opposite direction. I did patrol and had a meal and*
- 15 *took medicine, felt drowsy then did a patrol I was waiting on the news coming on the tv. I knew I was nodding off because dizziness I had to rest although I wasn’t sleeping.”*
38. When Mr Harper’s statement was read to him, he denied it as it was his perspective. He went on to say: *“I deny I was sleeping I was resting*
- 20 *waiting on news at 1130 but I admit I was drowsy and struggled to keep my eyes open due to the medication. When he called I was drowsy and couldn’t move much.”*
39. Mr Cook asked him to clarify that he had said he was “nodding off”, to which the claimant replied: *“Yeah I was drowsy and dizzy.”*
- 25 40. When asked to clarify what “nodding off” meant, the claimant said: *“I was struggling to stay awake for the news.”*
41. The claimant was asked what medication he had taken, and advised that it was peptic liquid. Mr Cook advised that the NHS website did not list

drowsiness as a symptom of this medication but suggested the claimant might provide more information as he was not a doctor himself.

5 42. Mr Cook went on to ask the claimant if he was saying that Mr Harper's version of events was wrong. The claimant responded: *"No I'm not saying he is lying. I'm saying because I was feeling dizzy I got a call and I wanted to check and confirm I made the check call, that's my mistake. His evidence is wrong, I checked my phone and confirmed I did check call. I could not go to reception because I was feeling extremely dizzy, because of that is why he thought I was sleeping. I was watching the news."*

10 43. With regard to what Mr Cook described as persistent lateness, the claimant accepted that he was late sometimes.

15 44. Mr Cook then asked what reason he had for having missed over 130 calls in August. The claimant said he was not sleeping, and that doing his patrol took priority. Mr Cook observed that when an officer carries out patrol he takes his mobile phone with him, and therefore can do the check call; 130 was atrocious. The claimant accepted that he should take the job more seriously.

20 45. The claimant provided Mr Cook with photographs of the bottle of Peptac Liquid which he was taking (188 – 190). Mr Cook pointed out that there is nothing said on the bottle to suggest that drowsiness would arise from its use. The claimant said that the bottle advises that the medication should be taken at bedtime and after food.

25 46. At the end of the meeting, Mr Cook referred to the fact that there were 3 serious allegations raised against the claimant, and that he already had a final warning dated 15 June 2023. He concluded by saying: *"Taking into account all the evidence today and our discussions the outcome I have decided on as an outcome of this meeting would be the termination of your contract. I feel you are unsuitable and fall short of the standard required to work as a Mitie security officer."*

47. Mr Cook, when asked by the claimant to give him a chance, advised that a chance had been given to him before but he had failed to improve.

48. Following the hearing, he wrote to the claimant on 29 September 2023 (159) to confirm that his decision was to dismiss the claimant.. In that letter, Mr Cook wrote:

“Having considered all the information available to me and having listened to what you said at the disciplinary hearing, I have decided to dismiss you in line with Mitie’s disciplinary policy.

The reason for your dismissal is gross misconduct was (sic) a result of:

- *Seriously breaching our health and safety procedure*
 - *Specifically, it is alleged that on 12th September 2023 you were sleeping whilst on duty, which is unacceptable in your role of a security officer as it leaves the site at risk.*
- *Persistent lateness*
 - *Specifically it is alleged that within the last 4 weeks, you have missed book on 12 times.*
- *Gross negligence of duties*
 - *Specifically, it is alleged that you are missing on average 4 check calls per shift and in August 2023 there were over 130 missed check calls when you were on the nightshift.*

Specifically, the reason for this decision continuous lateness for work and continuous missed check calls which has resulted in a loss in trust and confidence

In reaching this decision I have taken into account the medication you have stated you are taking. However given the seriousness of the misconduct and that you are currently on a final written warning for misconduct, having considered all the possible alternatives, including

extending your final written warning. I feel that the correct decision is to summarily dismiss you for gross misconduct.”

- 5 49. The claimant’s final date of employment was 25 September 2023. He was advised of his right to appeal against the decision to dismiss him, within 7 calendar days of receipt of that letter.
- 10 50. The claimant submitted an appeal against dismissal on 5 September 2023 (170). He stated that the reasons for his dismissal for gross misconduct were not entirely right, but that if he were given another chance he was ready to abide within the reasons given. He also promised that if given another chance, he would be *“alert all the time whilst on duty as I stopped taking Peptic Liquid medication, I will be getting an earlier bus and I will be very keen not to miss check calls.”*
- 15 51. On 6 October 2023, the claimant submitted an email to Alex Reid (161) to which he attached his appeal letter, a request for an extension and a screenshot of his mobile phone call register.
52. The extension referred to further details relating to his appeal (162ff).
53. He set out information that he considered should be taken into account in determining his appeal.
- 20 54. He denied that he was caught sleeping. He said he was watching TV, though he was drowsy and dizzy because of the medication he had taken. He set out his version of the events of the evening in question.
- 25 55. He denied that he had missed his book on times on 12 occasions in the previous 4 weeks. He maintained that he always arrived on site before his booking on time, and that if there were a problem it was related to the booking on system.
56. He denied that check calls were missed due to negligence, as he had been covering the site for 4 years without negligence or putting the clients and the business at risk.

57. The claimant was invited to attend an appeal hearing by letter dated 23 October 2023 (172). The hearing was set down for 27 October 2023.
58. The appeal hearing took place on 27 October 2023 and was chaired by Alex Reid. The claimant attended without any representative or anyone
5 accompanying him. John Sanders took notes of the hearing (174ff), which commenced at 1135 and finished at 1155.
59. The claimant told Mr Reid that he was not sleeping when Mr Harper attended the office on 12 September, and referred again to the medication which he had taken which was causing him to feel dizzy.
- 10 60. He continued to maintain that he had not been guilty of persistent lateness or missing check calls.
61. Following the appeal hearing, Mr Reid wrote to the claimant on 9 November 2023 (180) in which he confirmed that he was upholding the original decision to dismiss him, and that the appeal was unsuccessful.
- 15 62. Following his dismissal, the claimant obtained new employment with OCS, commencing on 26 February 2024.
63. During the period between his employment by the respondent and by OCS, the claimant was in receipt of Job Seekers' Allowance of £169.60 per fortnight from 22 October 2023 until 29 January 2024, a period of 4
20 months; and received Universal Credit from 26 February 2024 of £176.00 and 7 March 2024 of £176.68.
64. The claimant sets out his claimed losses in his Schedule of Loss (249), including details of the attempts he made to find alternative employment following his dismissal, and of the ongoing losses he continues to suffer
25 given the disparity between his pay from his current employers and that which he received from the respondent.
65. On 16 April 2024, Dr Iain Harper, the claimant's General Medical Practitioner, submitted a letter, addressed to whom it may concern, in which he stated (182):

5 *“Robert Muyanja is a patient here at Inveresk Medical Practice. He has asked for a letter with information about a prescription he was given in September 2023. He was prescribed peptac peppermint liquid at a dose of 2-4 x 5ml spoonfuls 20 minutes after meals and at bedtime on 12 September 2023. He called the practice on 15/9/23 to advise that after taking the medication he felt sedated. He also describes it as making him feel dizzy.”*

Submissions

10 66. Following the Hearing, the parties presented written submissions to the Tribunal. It is not necessary to set out the details of these submissions, but reference is made to them in the decision section below as appropriate.

The Relevant Law

15 67. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 (“ERA”), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of
20 fairness as expressed as follows:

25 “Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably

in treating it as a sufficient reason for dismissing the employee and

5 (b) shall be determined in accordance with the equity and substantial merits of the case.”

68. The Tribunal also referred to section 123(6) of ERA, which provides that
10 “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

69. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**. These
15 well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

70. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the
20 employer had a belief in the claimant’s conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all
25 the circumstances of the case?

71. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds the Tribunal that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter
30 Clark J goes on to state that “the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation,

going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party.”

5 72. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

73. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

10 *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the*
15 *1978 Act is as follows:*

(1) the starting point should always be the words of S.57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they
20 *(the members of the industrial tribunal) consider the dismissal to be fair;*

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

25 *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

5 (5) *the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

Discussion and Decision

74. The issue before the Tribunal in this case is whether or not the claimant was unfairly dismissed by the respondent.
- 10 75. The first matter to deal with is what the reason for dismissal was. In this case, this may be answered relatively simply. This was a case in which the claimant was dismissed on the grounds of gross misconduct, essentially for having been found to have been sleeping on duty, persistent lateness and missing check calls. The reason was therefore
15 one of conduct, a potentially fair reason for dismissal.
76. Next, the Tribunal must determine whether or not the respondent had a genuine belief that the claimant was guilty of the misconduct of which he was accused.
- 20 77. The dismissing officer in this case, Mr Cook emerged in evidence as straightforward and honest, and was clear in his conviction that the claimant was guilty of the misconduct alleged. He considered the evidence and came to a clear view that the claimant had been sleeping on duty, had been persistently late and had missed a significant number of check calls while on duty.
- 25 78. The Tribunal had to consider then whether the respondent's genuine belief was based upon reasonable grounds, and followed a reasonable investigation.
79. I reminded myself that it is not for the Tribunal to decide whether or not the claimant was guilty of these allegations, but whether it was

reasonable, on the basis of the information available and the investigation conducted, for the respondent to conclude that he was guilty.

80. Firstly, the respondent found that the claimant was found sleeping while on duty on 12 September 2023.

5 81. The evidence in relation to this matter came first from Mr Harper, the claimant's manager, who had attended without warning to the SQA site on that evening when the claimant could not be contacted. The evidence he gave was that he saw the claimant through the window sitting on the sofa in the reception area from behind, not moving, and took a
10 photograph (185). He attempted to get the claimant's attention by telephoning, without initial success, until the claimant noticed that his phone was ringing and answered.

15 82. I note that the claimant's representative submitted that Mr Harper's evidence should not be accepted as there were variations in what he said before the Tribunal and before the internal proceedings. While it is correct that Mr Harper gave fuller evidence before the Tribunal than he set out in his investigation report (which was in reality a statement of fact), it is necessary to consider the evidence which was before the respondent at the time of the decision to dismiss. The claimant's own evidence was of
20 considerable significance in this, as will be seen below.

25 83. The claimant denied that he was sleeping. Mr Harper did not see the claimant's face, and thus could not say beyond doubt that his eyes were closed and that he was asleep. However, the claimant's posture – which was consistent with a resting position – and the fact that he could not be roused initially suggested that Mr Harper had justification for being concerned.

84. However, in the investigation meetings, and disciplinary hearing, the claimant made a number of statements which were not entirely consistent with his denial that he was sleeping:

- 30
- "I was only nodding off" (to Mr Harper, 139);

- “Was more like dizziness, drowsiness” (to Mr Kerr, 147);
- “I was watching the news and struggling” (to Mr Kerr, 147);
- “I knew I was nodding off because dizziness I had to rest although I wasn’t sleeping” (to Mr Cook, 155);
- 5 • “I deny I was sleeping I was resting waiting on news at 1130 but I admit I was drowsy and struggled to keep my eyes open due to the medication. When he called I was drowsy [nodding off] and couldn’t move much” (to Mr Cook, 155).

10 85. In my judgment, the respondent was entitled to conclude that Mr Harper’s assessment that the claimant was sleeping was correct. The claimant denied that he was sleeping, but said he was nodding off, a colloquial expression which describes, in ordinary language, that he was if not asleep then falling asleep. The fact that he was not moving, was in a resting position and accepted that he was drowsy all add to the very
15 strong impression that he was in fact sleeping. It would be fair to say that he was not in an alert state of mind ready to carry out his duties as a Security Officer.

20 86. Accordingly, it is my judgment that the respondent had reasonable grounds to conclude that the claimant was asleep when Mr Harper found him on 12 September 2023.

87. Secondly, the respondent found that he had missed bus on times 12 times in the previous 4 weeks, and therefore considered that he was persistently late.

25 88. The claimant accepted that he was sometimes late (156), though sought to deflect attention from this by asserting that Abbas, his opposite number, was often or substantially late too. He also said that “On lateness my bus comes at around 5 to and it takes me a few minutes late but there are some delays”. It is clear that the claimant did not deny that he was late on a number of occasions. He appeared to suggest that the bus he
30 took would get him to work late, and would sometimes be delayed so that

he was even later. He did not have an explanation as to why he could not take an earlier bus to ensure that he was present on shift at the expected time.

5 89. Given the claimant's own evidence in the internal proceedings, it is my judgment that the respondent was entitled to conclude that he was persistently late on shift. While it was clear that he and Abbas shared a degree of animosity between themselves, there was no reason for the respondent to doubt the claimant's own acceptance that he was late on a number of occasions. In other words, he did not effectively deny that he
10 was persistently late.

90. Finally, the respondent found that the claimant had missed on average 4 check calls per shift, and in August 2023 there were over 130 missed check calls when he was on the nightshift.

15 91. The claimant contested the respondent's position on this. He maintained that most of these calls were missed between 7 and 8am when he would be busy admitting staff to the building. Mr Cook did not accept this, taking the view that the missed calls were across the nightshift rather than in those times. The claimant also stated that he would be out on patrol when the call came in, and if he did not have his mobile phone with him, he
20 would not hear the call coming in. Again, the respondent did not accept this, since he was supposed to have his mobile phone with him, that accepting the check call would take a matter of seconds, and that there was no reason to be out of touch. Check calls are plainly an important aspect of the Security Officer's routine, since as a lone worker the
25 respondent wishes to ensure that on a regular basis they check in with him to ensure that he is safe and able to carry out his duties.

30 92. When Mr Kerr asked him why so many calls were being missed, the claimant responded "Maybe there is no particular reason" (148), a curious reply in the circumstances which may simply indicate that he was unhappy at being pressed on the point. However, it does not amount to a denial of the respondent's allegations.

93. It should be said that the claimant's solicitor valiantly attempted to suggest that he was regularly too busy to answer calls because of cleaning and vacuuming duties which he had to carry out during his shift, taking this from a statement made by the claimant in a previous disciplinary hearing on 9 June 2023. In that statement (271), the claimant had stated that he had not heard a check call because he was busy hoovering and was tired and overworked. The difficulty for the claimant is that he did not give this explanation in the current internal proceedings. It would not, in my judgment, be reasonable to expect an employer to take account of a statement made in previous disciplinary proceedings if the claimant did not see fit to raise it in the current hearing or investigation. It is a matter for an employee to defend his actions according to what he considers appropriate, and in this case, the claimant did not say to Mr Harper, Mr Kerr or Mr Cook that the reason why he missed check calls was that he was busy vacuuming or carrying out other cleaning duties. Mr Kerr made clear that in any event, he would not have considered that to have been an adequate explanation for the number of missed calls, and since a check call takes very little time there was no reason why he could not have received or followed up a call.
94. Accordingly, it is my judgment that the respondent was entitled to conclude that the claimant was guilty of having missed a significant number of check calls in August 2023.
95. I find, therefore, that the respondent did have reasonable grounds upon which to base their genuine belief that the claimant was guilty of the allegations made against him.
96. In his submissions, Mr Wachtel suggested that the absence from the list of matters which would amount to gross misconduct of the offence of sleeping on duty meant that the respondent did not regard it as gross misconduct. It is my view that since the list of offences was specifically said not to be exhaustive, the respondent was not restricted to that list, and nor was the respondent barred from concluding that what they clearly

regarded as a serious offence amounted to gross misconduct. I cannot uphold Mr Wachtel's submission.

- 5 97. Was a reasonable investigation carried out? In my judgment it was. The claimant's own admissions relieved the respondent of the need to explore matters much further, but the claimant was given the opportunity to present a defence on his own behalf, and said nothing to persuade the respondent that they should not find that he had done what he was accused of doing.
- 10 98. The claimant did raise the fact that he was taking medication, peptac liquid, and suggested that that had caused him to be drowsy on the night in question, 12 September. The respondent saw the claimant's photographs of the bottle, and saw nothing on the bottle to suggest that drowsiness was a side-effect of the medication. Further, they investigated the NHS website and again found nothing to suggest that this was a likely
15 outcome of his use of this medication. The claimant produced nothing further at the time of the disciplinary process.
- 20 99. He did produce a letter from his GP dated 16 April 2024 (182), but I discounted this for two reasons: firstly, it was not made available to the respondent at the time of the disciplinary process, and accordingly it would be quite unfair to criticise them for not having taken into account what was said in the letter, when the claimant could have produced it during that process but did not; and secondly, the letter is worded very carefully, so as not to express any opinion as to whether or not the medication could cause drowsiness, or state as a matter of fact that it did
25 cause the claimant drowsiness, but merely stated that the claimant reported that it had that effect. There was, therefore, no evidence available to the respondent at the time of making its decision that the claimant was somehow impaired by the medication he was taking.
- 30 100. In any event, the claimant had not told his manager at the time that he was taking such medication, and if it rendered him drowsy, or even caused him to be asleep, that raised in the respondent's mind the

question of whether or not he was in fact fit to be at work. The fact that he did not raise this matter but instead went to work demonstrates that the claimant had no regard for the effect of the medication and had to accept whatever consequences arose. Finally, he said nothing to Mr Harper about this on the evening in question.

101. It is also my judgment that the respondent followed a fair procedure in reaching the decision to dismiss the claimant, albeit that the claimant did not make this part of his case before me. He was given the opportunity on several occasions to set out his response to very clear and specific allegations; to attend an investigation and a disciplinary meeting; to be accompanied to any of these meetings and to appeal against the decision.

102. Finally, the Tribunal requires to consider whether the decision to dismiss the claimant fell within the range of reasonable responses open to a reasonable employer.

103. In my judgment, this decision was amply justified by the respondent. The claimant's role as a Security Officer was one which required him to protect the building and people whom his employers had undertaken to protect. Being asleep on duty is self-evidently a significant failure to carry out that role; he cannot possibly protect his client's premises when asleep, or, as he put it, nodding off. The respondent's responsibility to their client, in this case the SQA, is to give them reassurance that they are protecting their property in the manner for which they were contracted, and the claimant's duty was to carry out his duties accordingly. Falling asleep on duty is clearly a significant failure on his part.

104. Similarly, it was legitimate for the respondent to take a severe view of the claimant's persistent lateness, and of his failure to answer check calls which meant that the respondent could not be sure if he were safe and able to carry out his duties.

105. Finally, the claimant had a live warning already on his file for having fallen asleep at work, the very allegation to which he was subject in these proceedings. The respondent was therefore entitled to take that into account in determining the sanction to be imposed.

5 106. In my judgment, the decision to dismiss in this case fell well within the range of reasonable responses open to a reasonable employer in the circumstances.

107. It is therefore my judgment that the claimant's claim of unfair dismissal must fail, and it is dismissed.

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Murdo A Macleod
Employment Judge

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12 August 2024
Date of Judgment

Date sent to parties

12/08/2024

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I confirm that this is my Judgment in the case of Muyanja v Mitie Limited and that I have signed the Judgment by electronic means.